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Supreme Court, U.S.
FILED
AUG 27 2009
OFFICE OF THE CLERK

No. 09-557

IN THE

Supreme Court of the United States

ROYAL OAK ENTERTAINMENT, L.L.C.; MURRAY HODGSON; ROYAL OAK THEATRE, L.L.C.; PETER HENDRICKSON; AND NEW PROMO, L.L.C., AND THEIR COUNSEL, CINDY RHODES VICTOR, PETITIONERS

v.

CITY OF ROYAL OAK; JAMES MARCINKOWSKI; AND CHARLES SEMCHENA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CINDY RHODES VICTOR
Counsel of Record

The Victor Firm, PLLC
35801 Mound Road
Sterling Heights, MI 48310
(586) 274-9600

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

Whether a grant of a writ of certiorari is warranted where, if left without review, the decision of the United States Court of Appeals for the Sixth Circuit will permit courts to sanction both parties and attorneys under 28 U.S.C. §1927 for failing to dismiss their federal claims upon the filing of a dispositive motion where the facts of the case have yet to be developed and without a finding that the parties or their counsel multiplied proceedings or acted vexatiously.

Whether a grant of a writ of certiorari is warranted where, if left without review, the decisions of the United States Court of Appeals for the Sixth Circuit will permit courts to make both parties and their attorneys liable for attorneys fees under 42 U.S.C. §1988 without the record containing any factual finding or ruling that the underlying civil rights claim was frivolous.

Whether a grant of a writ of certiorari is warranted where, if left without review, the decisions of the United States Court of Appeals for the Sixth Circuit will permit courts to read into 28 U.S.C. §1927 and 42 U.S.C. §1988 a standard which is only found in Fed. R. Civ. P. 11.

PARTIES TO THE PROCEEDING

Petitioners Royal Oak Entertainment , L.L.C., Murray Hodgson, Royal Oak Theatre, L.L.C., Peter Hendrickson and New Promo, L.L.C. and their counsel Cindy Rhodes Victor were the plaintiffs-appellants below.

Respondents the City Of Royal Oak, James Marcinkowski and Charles Semchena were the defendants-appellees below.

CORPORATE DISCLOSURE STATEMENT

Petitioners, Michigan limited liability companies, have no parent corporation, and no publicly held company owns ten percent or more of any of their stock. Rule 29.6.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment is unreported and is reproduced in the Appendix, App. A1-A14. The decision of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing en banc is unreported and is reproduced in the Appendix, App. A27-A28. The underlying decision of the United States District Court for the Eastern District of Michigan is unreported and is reproduced in the Appendix, App. A15-A26.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing en banc was filed on May 29, 2009. This Court has jurisdiction to review this decision under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows, in pertinent part:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition seeks review of the decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court for the Eastern District of Michigan awarding attorney fees and costs against petitioners and their counsel in favor of respondents.

A. Facts Of The Case

Petitioners brought suit in the United States District Court for the Eastern District of Michigan against respondents alleging various federal claims, including claims under 42 U.S.C. §§1983, 1985 and 1986 for violation of petitioners' constitutional rights and under 18 U.S.C. §§1961 and 1962 for violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO Act"), and including pendant state law claims.

Before discovery had begun or any initial pleadings beyond a complaint and answer were filed, respondents filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(c). The parties fully briefed the issues raised by the motion. However, because respondents had presented materials which were outside of the pleadings in their motion to dismiss, on January 6, 2005, the district court converted the motion to one for summary judgment pursuant to Fed. R. Civ. P. 56, and ordered the parties to present their arguments based upon the summary judgment standard.

The district court on April 14, 2005 issued an 18 page decision granting respondents' motion for summary judgment on the federal claims, and remanding the state law claims to the Oakland County Circuit Court (hereinafter "Memorandum Opinion and Order"). Petitioners appealed this order, and the United States Court of Appeals for the Sixth Circuit, in a 16 page decision issued November 9, 2006, affirmed the decision, in part for the reasons given by the district court, and in part on other grounds, and further considered the remanding of the state law claims to be the district court declining supplemental jurisdiction ("Order from USCA").

There was never a conference under Fed. R. Civ. P. 26, nor were initial disclosures made, nor was any scheduling conference held in this case. No discovery of any kind ever took place. Respondents never made a demand on petitioners under Fed. R. Civ. P. 11(c)(1)(A) or (B) to withdraw the complaint, nor did they serve a motion on petitioners pursuant to the procedure mandated by Rule 11.

On April 29, 2005, respondents filed a motion for attorney fees and costs. On May 21, 2007, the district court granted in part respondents' motion, finding petitioners and their counsel jointly and severally liable for respondents' costs for the filing of the motion to dismiss and subsequent summary judgment motion, as well as for attending conferences related to those motions (A15-A26). The district court, in footnote 4, stated that because *respondents* presented materials outside of the

pleadings in their motion to dismiss, it was appropriate to find *petitioners* liable for the costs and fees associated with the summary judgment motions which the district court ordered the parties to file (A21).

The district court also held that petitioners and their counsel should be liable for these costs because, even though at the time the answer to the complaint was filed petitioners could reasonably argue that they believed some legal remedy was appropriate, petitioners should have realized that they did not have standing when respondents filed their motion to dismiss, but they continued to litigate by filing an brief in opposition to the motion to dismiss (A19). The district court awarded respondents $29,772.50 in attorney fees and costs against petitioners and their counsel, jointly and severally, without an evidentiary hearing or examination of the amounts which respondents claimed as the hourly fee or hours expended as attorneys fees (A25).

B. Proceedings Below

Petitioners brought the underlying suit in the United States District Court for the Eastern District of Michigan on July 21, 2004. After filing an answer to the complaint, respondents filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(c) on September 14, 2004. No scheduling conference had yet been held, no initial disclosures made, and no discovery of any kind took place. Because respondents included material not contained in the

complaint, the district court converted the motion into one for summary judgment pursuant to Fed. R. Civ. P. 56 on January 6, 2005, and ordered the parties to re-brief the motion under the summary judgment standard. The parties complied with the order, and on April 14, 2005, the district court granted summary judgment in favor of respondents.

Petitioners appealed this order to the United States Court of Appeals for the Sixth Circuit, and on November 9, 2006, the Sixth Circuit affirmed the decision of the district court. These decisions are not part of this petition for writ of certiorari, although the facts from the decisions are necessary for an understanding of the issue of this instant petition.

On April 29, 2005, respondents filed a motion for attorney fees and costs. On May 21, 2007, the district court granted in part respondents' motion, finding petitioners and their counsel jointly and severally liable for respondents' costs for the filing of the motion to dismiss and subsequent summary judgment motion, as well as for attending conferences related to those motions (A15-A26). Petitioners and their counsel moved for reconsideration of the May 21, 2007 order, which was denied on June 8, 2007.

Petitioners and their counsel filed an appeal from this decision to the United States Court of Appeals for the Sixth Circuit on July 6, 2007. The Sixth Circuit issued an opinion and order affirming the district court decision on March 17, 2009 (A1-

A14). Petitioners and their counsel filed a petition for en banc review by the Court of Appeals, which was denied on May 29, 2009 (A27-A28).

REASONS FOR GRANTING THE WRIT

This Court has long upheld the guarantees in the Fourteenth Amendment to the United States Constitution that a person shall not be deprived of property rights and liberty interests without due process of law, and that all persons shall be afforded equal protection of the laws.

This Court should grant review of this petition because the ruling of the United States Court of Appeals for the Sixth Circuit in this matter clearly decides important questions of federal constitutional law in a way which directly conflicts with decisions of this Court and other Circuits. Absent review by this Court, courts will be permitted under the Sixth Circuit's decision effectively to sanction plaintiffs and their counsel merely for filing a brief in opposition to a dispositive motion. Review is necessary to secure or maintain the uniformity of this Court's decisions.

Review is also warranted because the decision below intertwines federal statutes with federal court rules, and impermissibly applies the standards of the federal court rules to the federal statutes. The Sixth Circuit's decision, if allowed to stand, would render meaningless the holdings of this Court and the circuits by effectively negating the standards by which sanctions are awarded under the statutes,

and applying the same standard to any sanction motion, whether it was brought pursuant to the federal court rules or by statute.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF THIS COURT AND DECISIONS OF OTHER FEDERAL CIRCUITS

A. *The Decision Below Expands The Scope Of 29 U.S.C. §1927 Beyond That For Which The Statute Provides And Assesses Sanctions Under Section 1927 Not Only Against Counsel, But Against Petitioners - Who Are Not Attorneys - As Well*

The district court ordered that petitioners and their counsel pay respondents attorneys fees and costs pursuant to 28 U.S.C. §1927 and 42 U.S.C. §1988. Section 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof *who so multiplies the proceedings in any case unreasonably and vexatiously* may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct (emphasis added)

An attorney sanctioned under Section 1927 is thus required to satisfy personally the excess costs attributable to his misconduct. *See In re Ruben*, 825

F.2d 977, 983 (6th Cir. 1987). Furthermore, this Court in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766-67 (1980), held that federal courts have the inherent power to assess attorney's fees against counsel who willfully abuse judicial processes or who otherwise act in bad faith.

However, unlike sanctions imposed under a court's inherent authority, Section 1927 sanctions require a showing of something more than negligence or incompetence. *In Re Rubin*, 825 F.2d at 984. Thus, an attorney is subject to being sanctioned when that attorney intentionally abuses the judicial process or knowingly and needlessly multiplies proceedings. The purpose of Section 1927 is "to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006).

Other circuits have similarly held that Section 1927 sanctions are specifically meant to deter attorneys from egregious abuse of the judicial process. *Amlong & Amlong, P.A. v. Denny's, Inc.*, 457 F.3d 1180, 1190 (11th Cir. 2006) (Section 1927 sanction appropriate only when the attorney's conduct is so egregious that it is "tantamount to bad faith."); *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1224 (10th Cir. 2006) (Section 1927 sanction was proper against an attorney who had "continued to assert" bogus claims "long after it would have been reasonable and responsible to have dismissed the claims," and who "commenced the action . . . without

grounds and thereafter maintained 'the litigation in bad faith, vexatiously, wantonly and for oppressive reasons); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 795 (3d Cir. 1999) ("Imposition of attorney's fees and costs under section 1927 is reserved for behavior of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation"); *In re Keegan Management Co. Sec. Litig. (Keegan Management Co. v. Moore),* 78 F.3d 431, 435 (9th Cir. 1995) (Section 1927 "applies only to unnecessary filings and tactics once a lawsuit has begun"); *United States v. Nesglo, Inc.*, 744 F.2d 887, 892 (1st Cir. 1984) (serious and studied disregard for the orderly process of justice warranted liability under Section 1927); *Overnight Transp. Co. v. Chicago Ind. Tire Co.,* 697 F.2d 789, 795 (7th Cir. 1983) ("vexatious" is defined as "lacking justification and intended to harass").

In the case at bar, the record contains absolutely no evidence which would indicate that petitioners' counsel took any action which unreasonably or vexatiously multiplied the proceedings, nor is there any evidence that petitioners' counsel did anything which was intentionally abusive of the judicial process or was an action taken in bad faith. As the district court noted in footnote 4 of its May 21, 2007 Order, it was *respondents* who presented matters outside the pleadings in their motion to dismiss and supporting brief (A21). It was the district court who converted the motion to dismiss into a motion for summary judgment, and ordered renewed briefing. Yet the

district court faulted petitioners' counsel for plaintiffs simply because petitioners' counsel did not immediately and voluntarily dismiss the case upon the filing of the motion to dismiss (A20).

"[A] district court must resist the urge to engage in post hoc reasoning and the hindsight logic of concluding a suit is without foundation because the plaintiff ultimately does not prevail." *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 183_(6th Cir. 1985) (*quoting Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978)). Assessing whether conduct is "reasonable under the circumstances" requires the district court to analyze counsel's conduct as it appeared at the time counsel acted. *Salkil v. Mount Sterling Twp. Police Dep't.*, 458 F.3d 520, 530 (6th Cir. 2006). This "requires inquiry into the plaintiff's basis for filing suit. Awards to prevailing defendants will depend on the factual circumstances of each case." *Smythe-Cramer Co.*, 754 F.2d at 183. "'[A]n award of attorneys' fees against a losing plaintiff in a civil rights action is an extreme sanction, and must be limited to truly egregious cases of misconduct.'" *Salkil*, 458 F.3d at 532.

The district court stated in its May 21, 2007 Order that at the outset of the case, and even after respondents filed their answer, petitioners could reasonably argue they believed some legal remedy was appropriate (A19), and that it was not "frivolous, unreasonable, or without foundation" at the outset of the case. However, the district court then stated that upon the filing of the motion to

dismiss, petitioners were apprised of their "legal error" and continued to litigate the case (A23). But, as petitioners set forth in their complaint, standing for their claims was not based on the liquor license held by a third party, NIPP, but in fact was based on the Management Agreement petitioners had with NIPP, as well as respondent the City of Royal Oak's ***approval of the transfer of that liquor license*** from NIPP to petitioner Hendrickson. Before the Michigan Liquor Control Commission ("MLCC") could effectuate the transfer, respondent the City of Royal Oak voted to advise the MLCC that it objected to the "renewal" of that license to Hendrickson. The complexity of the underlying facts in this case were not as simple and clear as respondents attempted to portray them, and required the district court and the Sixth Circuit to undertake a detailed analysis before it could reach any conclusions.

All petitioners' counsel did was file a response to a motion to dismiss under Rule 12(b). This was not an unreasonable course of action, nor can it be considered a willful abuse of the judicial process, nor can this be considered truly egregious conduct. The district court did no analysis as to whether counsel's conduct was reasonable as to the time it was made, as required under *Salkil*. The district court did not find that there was any egregious misconduct on behalf of either petitioners or their counsel. The district court did not make an inquiry as to the factual underpinnings of petitioners' suit. While the district court held that petitioners did not have standing to bring their federal claims, it made no

determination whatsoever regarding the state law claims, and instead remanded those to state court.

"A sanction is generally improper where a successful motion could have avoided any additional legal expenses by defendants." *In re Ruben*, 825 F.2d at 988. In this case, respondents' motion was successful, which avoided the discovery process and subsequent pleadings. The fact that respondents failed to properly format their first motion was not the fault of petitioners.

Thus, the district court engaged in post hoc reasoning and used hindsight logic to hold that petitioners' claims were frivolous. Nowhere in either the district court's order granting summary judgment to respondents or the Sixth Circuit's opinion does it say that petitioners' federal claims were frivolous, groundless, or without foundation. Indeed, the complicated factual scenario demonstrates that petitioners did have legitimate grounds on which to believe that they had been wronged by respondents. Both the district court and the Sixth Circuit engaged in detailed analyses to determine that petitioners lacked standing to bring federal claims.

The district court did not set forth in its opinion the reason why the lack of standing on a claim made that claim frivolous. It instead stated only that, while petitioners' claims were not frivolous, unreasonable, or groundless at the outset of litigation, they simply became so upon the filing of respondents' motion to dismiss (A19-A20, A23).

The district court also stated in its opinion that it was sanctioning petitioners' counsel for not making a good faith argument for the modification of existing law (A20, A23, A24). Yet, during the hearing on respondents' motion for costs held May 9, 2007, the district court complimented petitioners' counsel for doing their best "in whatever papers you did file in opposition to the defendant's position." It is difficult to understand how the district court could determine that petitioners' counsel unreasonably or vexatiously multiplied the proceedings when the district court itself stated on the record that petitioners' counsel did their best. The district court further conceded there was never a "firm finding" that petitioners' claims lacked any basis.

Therefore, there is nothing in the record which indicates that the district court made any finding that petitioners or their counsel engaged in any sort of misconduct, and certainly not "truly egregious misconduct" which would warrant the sanctions it imposed. The district court sanctioned petitioners' counsel (and interestingly, petitioners themselves, even though Section 1927 only imposes sanctions on attorneys and petitioners *are not attorneys*) merely because they did not argue for the modification of existing law, which is a component of sanctions under Fed. R. Civ. P. 11. "An attorney is liable under §1927 solely for excessive costs resulting from the violative conduct." *Ridder v. City of Springfield,* 109 F.3d 288, 299 (6th Cir. 1997). There is no authority that holds that failure to make an argument for the modification of existing law is a

violation of §1927. Accordingly, petitioners and their counsel submit that sanctions pursuant to 28 U.S.C. §1927 are not warranted in this case, and respectfully request that this Court grant review in this case.

B. *The Decision Below Is Contrary To This Court's Decisions Regarding The Imposition Of Sanctions Under 42 U.S.C. §1988*

42 U.S.C. §1988(b) permits prevailing parties in civil rights actions to obtain awards of attorneys fees. Section 1988(b) states, in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Defendants in a civil rights action are not entitled to attorney's fees under 42 U.S.C. §1988 merely because they prevailed in suit. *Riddle v. Egensperger*, 266 F.3d 542 (6th Cir. 2001). The *Riddle* court stated "[e]ven though the claims *after discovery* are found to be without merit by a court,

such a finding does not equate with a determination that the claims were without foundation when the complaint was initially filed." *Id.* at 551 (emphasis added). The court made clear that without such a finding, the awarding of sanctions to the defendants under 42 U.S.C. §1988 was improper. *Id.* at 553.

Although the language of 42 U.S.C. §1988 seems not to distinguish between prevailing parties, prevailing plaintiffs receive attorney's fees as matter of course, but prevailing defendants only receive attorney's fees if plaintiffs' claims were frivolous, unreasonable, or groundless. *Wayne v. Village of Sebring*, 36 F.3d 517, 530 (6th Cir. 1994) (*quoting Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)). This Court has held that the mere fact that a plaintiff's allegations in an action under 42 U.S.C. §1983 prove legally insufficient to proceed to trial are not, for that reason alone, "groundless" or "without foundation" so as to permit an award of attorney's fees against that plaintiff. *Hughes v. Rowe*, 449 U.S. 5 (1980). Section 1988 only authorizes the imposition of fees against parties to the litigation, not their attorneys. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761 (1980).

The district court used the definition of "frivolous" found in this Court's opinion in *Neitzke v. Williams*, 490 U.S. 818 (1989), to rule that petitioners' claims lacked an arguable basis in law. In *Neitzke*, this Court defined "frivolous" under 28 U.S.C. §1915(d). Because 42 U.S.C. §1988 does not use the word "frivolous" in the statute, any

definition must be accorded its ordinary meaning. *Chapman v. United States*, 500 U.S. 453 (1991). The Sixth Circuit has defined a "frivolous" position as one lacking a reasonable legal basis or lacks a reasonable expectation of attaining sufficient material evidence by the time of trial. *United States v. Heavrin*, 330 F.3d 723, 729 (6th Cir. 2003).

The district court, in its April 14, 2005 Order granting summary judgment to respondents, did not find that petitioners' claims lacked a reasonable legal basis, nor that the claims were without foundation, groundless, or frivolous. The district court found that petitioners did not have a recognizable property interest on which to base their constitutional claims. It is only with the May 21, 2007 Order granting attorney fees that the district court suggests, for the first time, that petitioners' claims were frivolous. Further, while the district court stated that respondents incurred fees "in major part due to inadequate legal research on the part of Plaintiffs' counsel" (A19), the district court made no inquiry as to whether this assumption was correct. Furthermore, at the hearing on May 9, 2007 on respondents' motion for costs, the district court stated that petitioners "did [their] best to try to find some ground on which [they] could successfully claim that [respondents'] motions were not entitled to be acted upon." Thus, for the district court to state that petitioners and their counsel did their best when opposing respondents' motion to dismiss, and then later sanction petitioners and their counsel for doing their

best, does not support that petitioners' arguments were frivolous, groundless or lacking foundation.

Indeed, petitioners and their counsel submit that the district court incorrectly used its analysis as to standing to decide that the case lacked merit, contrary to controlling decisions of this Court. This Court has previously stated that these are different inquiries:

> [A]lleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk obscuring what is at issue in a given case, and thus to risk uninformed, poorly reasoned decisions that may result in injustice. Too often these various questions have been merged into one confused inquiry, lumped under the general rubric of "standing." The books are full of opinions that dismiss a plaintiff for lack of "standing" when dismissal, if proper at all, actually rested either upon the plaintiff's failure to prove on the merits the existence of the legally protected interest that he claimed, or on his failure to prove that the challenged agency action was reviewable at his instance.

Barlow v. Collins, 397 U.S. 159, 176 (1970).

This Court in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), stated that it has required that "proper jurisdiction .... begins at least as early as 1804, when we set aside a judgment for the defendant at the instance of the losing plaintiff who had himself failed to allege the basis for federal jurisdiction," citing to *Capron* v. *Van Noorden*, 6 U.S. 126 (1804). When the lower federal court lacks jurisdiction, the appellate court has jurisdiction on appeal not on the merits, but merely for the purposes of correcting the error of the lower court in entertaining the suit. *United States* v. *Corrick*, 298 U.S. 435, 440 (1936) (footnotes omitted). Standing to sue is part of the common understanding of what it takes to make a justiciable case. Before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue. *Whitmore* v. *Arkansas,* 495 U.S. 149, 155 (1990). The threshold inquiry into standing "in no way depends on the merits of the [petitioner's] contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Yet, in the instant case, the district court dismissed petitioners' suit for lack of standing as to petitioners' federal claims, and it transformed the standing analysis into one in which the federal claims were held - two years after the motion to dismiss was granted without such a finding - to be frivolous, without any factual or legal determination to support that transformation, and without making any analysis into the state law claims. The district court held simply that petitioners lacked a

recognizable property interest on which they could bring their federal claims, not that the claims themselves were unfounded, a finding which Section 1988 requires before attorneys fees can be assessed under that section.[1]

Also, the district court's May 21, 2007 order granting costs was vague as to the standard which it applied when awarding sanctions under §1988, contrary to the direction in this Court's decisions. The district court does not state any specific, articulated facts which form the basis for the imposition of sanctions under §1988. There was no finding of egregious conduct on the part of petitioners (or their counsel), only that they lacked a recognizable property interest sufficient to have standing, and that their First Amendment claim contained "no plausible evidence" (even though the district court never permitted petitioners to conduct discovery) (A20).

The district court therefore misapplied this Court's prior holdings and used erroneous legal standards to sanction petitioners and their counsel under §1988. The district court asserted that, if petitioners had made a good faith argument for the modification of existing law, then attorney fees would have been inappropriate (A A20, A23, A24).

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[1] The district court stated at the hearing on May 9, 2007 that the Sixth Circuit had held that petitioners' claims were frivolous. However, review of the Sixth Circuit's November 9, 2006 decision clearly shows that the Sixth Circuit *never* made that determination when it affirmed the district court's grant of summary judgment.

But that is not the standard under §1988 (nor is it the standard under 29 U.S.C. §1927) on which to assess attorney fees against petitioners. Instead, it is one of the possible mechanisms for avoiding sanctions under Fed. R. Civ. P. 11, which respondents admitted in their briefing they did not seek. This statement by the district court, that failure to make a good faith argument for the modification of existing law made attorney fees appropriate, clearly shows that the district court erroneously applied the legal standards in awarding sanctions and applied the law improperly in this case.

Further, this Court has determined that the award of fees jointly and severally against both petitioners and their counsel is not permitted under §1988. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). As this Court stated in that case:

> The Senate Report accompanying §1988 stated that the bill authorizes "an award of attorneys' fees against a *party*. . . ." S. Rep. No. 94-1011, p. 5 (1976) (emphasis supplied). This reference reinforces the view that the statute was not intended to permit recovery from opposing counsel.

Id. at 761, n.9.

Thus, the rulings of the district court and the Sixth Circuit both directly contradicted this Court's prior holdings when the district court assessed attorneys fees against both petitioners and their

counsel pursuant to §1988 and when the Sixth Circuit affirmed that decision. The Sixth Circuit even failed to follow its own controlling authority by disregarding a prior case in which it overturned an award of attorney fees to the defendant where the plaintiff had lacked standing to pursue his claims. *Salkil*. As the court stated in that case, "[t]he record in this case" clearly indicates that "under the circumstances," [counsel's] failure to recognize Salkil's lack of standing was reasonable. In concluding otherwise, the district court improperly evaluated [counsel's] conduct with the wisdom of hindsight, thereby abusing its discretion. 458 F.3d at 531-32.

Accordingly, as the decisions of the district court and the Sixth Circuit imposing sanctions against petitioners and their counsel under Section 1988 are contrary to prior holdings by this Court, petitioners and their counsel respectfully request this Court grant review in this case.

II. THE LOWER COURTS IMPERMISSIBLY INTERTWINED SANCTIONS UNDER FED. R. CIV. P. 11 WITH THE FEDERAL STATUTES

Sanctions may not be imposed under Fed. R. Civ. P. 11 for plaintiffs' failure to "throw in the towel" as soon as they discovered that their claims were legally insufficient. *Samuels v Wilder*, 906 F.2d 272 (7th Cir. 1990). Some circuits have held that Rule 11 was intended to deter claims with no factual or legal basis at all, but creative claims, coupled with even ambiguous or inconsequential

facts, may merit dismissal but not punishment. *Davis v. Carl*, 906 F.2d 533 (11th Cir. 1990); *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984 (4th Cir. 1987). Several circuits hold that Rule 11 is not intended to be a weapon against particular arguments in motion or pleading, but was designed to address pleading as whole; thus, a court must look to a pleading or a motion as a whole when attempting to determine propriety of Rule 11 sanctions, as litigants should not be penalized for presenting potentially meritorious issues or grounds in motion. *Milwaukee Concrete Studios v. Fjeld Mfg. Co.*, 8 F.3d 441, 451 (7th Cir. 1993); *Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 467 (1st Cir. 1993); *White v. General Motors, Inc.*, 908 F.2d 663, 675 (10th Cir. 1990); *Romero v. City of Pomona*, 883 F.2d 1418, 1429 (9th Cir. 1989); *Forrest Creek Assocs., Ltd. v. McLean Sav. and Loan Ass'n*, 831 F.2d 1238, 1245 (4th Cir. 1987); *Burull v. First Nat'l Bank*, 831 F.2d 788, 789 (8th Cir. 1987).

This Court stated in its May 21, 2007 Order that "[a]ttorney fees would not be appropriate if Plaintiffs had made some good faith argument to modify that law, but they failed to do so. See, e.g., Fed. R. Civ. P. 11(b)(2)." (A20). However, there was no reason for petitioners to argue for a modification of existing law, as petitioners' response to the motion to dismiss was to advance that the factual allegations had evidentiary support, or would likely have evidentiary support after a reasonable opportunity for investigation or discovery, pursuant to Fed. R. Civ. P. 11(b)(3). Petitioners had reason to believe that the liquor license which respondent the

City of Royal Oak had granted to petitioner Peter Hendrickson, the Management Agreement petitioners had with the license holder, NIPP, along with the approved Plan of Operation submitted by Hendrickson, gave them a protected property and liberty interests, and therefore, when the City of Royal Oak took actions to deprive them of their interests, they had a cognizable constitutional claim.

There never was a demand under Fed. R. Civ. P. 11(c)(1)(A) or 11(c)(1)(B) that petitioners or their counsel withdraw or dismiss the complaint. "[A] party seeking sanctions must follow a two-step process: first, serve the Rule 11 motion on the opposing counsel for a designated period (at least twenty-one days); and then file the motion with the court." *Ridder v. City of Springfield,* 109 F.3d 288, 294 (6th Cir. 1997). This "safe harbor" provision is to provide the opposing party sufficient opportunity to choose whether to withdraw or cure the offense voluntarily before the court disposes of the challenged contention." *Id.* at 297. Compliance with the safe harbor provision under Rule 11 is an absolute requirement:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court

> may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Fed. R. Civ. P. 11(c)(1)(A). The "safe harbor provision" is designed to "put the filing lawyer on notice that he or she may be sanctioned and to give the filing lawyer an opportunity to reconsider." *Morganroth & Morganroth v. Delorean,* 123 F.3d 374, 384 (6th Cir. 1997); *see also Blachy v. Butcher*, 129 Fed. Appx. 173, 180 (6th Cir. 2005). Because respondents did not request of petitioners that they withdraw the complaint or any portion of the complaint, sanctions against petitioners and their counsel are not warranted under Rule 11.

In the case at bar, respondents did not move the district court to sanction petitioners and their counsel under Rule 11, likely because they did not follow the mandated procedure of Rule 11. Instead, after being granted summary judgment, respondents filed a motion for costs pursuant to 28 U.S.C. §1927 and 42 U.S.C. §1988. However, the district court appeared to sanction petitioners and their counsel based on a requirement found only in Rule 11, not in 28 U.S.C. §1927 or 42 U.S.C. §1988 (A20, A23, A24).

If the district court were to have imposed sanctions on its own initiative under Fed. R. Civ. P. 11(c)(1)(B), it would have been required to enter an order describing the specific conduct which appeared to violate subdivision (b), and direct the attorney to show cause why it has not violated

subdivision (b). No such order was entered in this case, and no show cause or other evidentiary hearing was ever held.

Further, there is nothing in the record which demonstrates that respondents incurred additional expenses because of petitioners' conduct. Respondents themselves filed a motion to dismiss which presented materials outside of the pleadings, which necessitated the district court to convert the motion to dismiss into a summary judgment motion under Rule 56. The district court *ordered* the parties to submit additional briefing on the converted motion for summary judgment. Yet the district court assessed costs and fees against petitioners and their counsel for both the motion to dismiss and the motion for summary judgment, even though the conduct of petitioners and their counsel at that time amounted simply to the filing of a complaint, which this Court said was not "frivolous, unreasonable, or without foundation" at the time of filing (A23).

Finally, the district court appeared to use the standards of Fed. R. Civ. P. 11 to sanction petitioners and their counsel under 42 U.S.C. §1988 and 28 U.S.C. §1927. As previously stated, the district court held that "[a]ttorney fees would not be appropriate if Plaintiffs had made some good faith argument to modify that law, but they failed to do so" (A20). Thus, the only basis on which the district court sanctioned petitioners and their counsel - that they did not make some good faith argument to modify the law as Rule 11 requires - is not a basis

for imposing sanctions under 42 U.S.C. §1988 (which requires that the claim must be frivolous, unreasonable, or groundless) or 29 U.S.C. §1927 (sanctions imposed for unreasonable and vexatious multiplication of the proceedings), the district court improperly intertwined these statutes and Rule 11, contrary to this Court's rulings. Petitioners and their counsel submit that if this Court does not grant review of this case, district courts will continue to impermissibly intertwine these statutes and Rule 11. Accordingly, petitioners and their counsel respectfully request that this Court grant review of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CINDY RHODES VICTOR
The Victor Firm, PLLC
35801 Mound Road
Sterling Heights, Michigan 48310
(586) 274-9600

Attorneys for Petitioners
Royal Oak Entertainment , L.L.C.,
Murray Hodgson,
Royal Oak Theatre, L.L.C.,
Peter Hendrickson,
and New Promo, L.L.C.
and their Counsel

No. 07-1904

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROYAL OAK ENTERTAINMENT, L.L.C., ET AL., Plaintiffs-Appellants,

v.

CITY OF ROYAL OAK, ET AL., Defendants-Appellees.

OPINION

Royal Oak Entertainment, L.L.C. ("ROE"), Murray Hodgson, Royal Oak Theatre, LLC ("ROT"), Peter Hendrickson, and New Promo, LLC, (collectively, "Plaintiffs") appeal an award of attorney fees and costs in the amount of $ 29,772.50 against Plaintiffs and their counsel in favor of Defendants-Appellees, the City of Royal Oak, Michigan ("Royal Oak"), James Marcinkowski, Charles Semchena, and Rodney Keteyian (collectively, "Defendants"). Plaintiffs argue that the district court abused its discretion under 42 U.S.C. § 1988, 28 U.S.C. § 1927, and Federal Rule of Civil Procedure 11. Defendants argue that the district court properly exercised its discretion in awarding attorney fees and costs under both § 1988 and §1927, and that the district court did not rely on Rule 11. For the reasons set forth below, we AFFIRM the district court's decision.

I. BACKGROUND

The merits of Plaintiffs' claims have already been heard, and Plaintiffs' causes of action have previously been dismissed by this Court. *Royal Oak Entm't, LLC v. City of Royal Oak*, 205 F. App'x 389 (6th Cir. 2006). While the present appeal involves only the sanctions against Plaintiffs and their counsel, the underlying facts of this dispute are relevant to the district court's award of attorney fees and costs. The facts are set forth in this Court's previous opinion: Nobody in Particular Presents ("NIPP"), which is not a party to this action, purchased the Royal Oak Music Theater ("the Theater"), located in Royal Oak, Michigan, and the Theater's liquor license, at a bankruptcy sale some time before 2000. NIPP thereafter obtained the City's approval of a plan of operation ("PO") for the Theater, and for a time operated the Theater itself. In the fall of 2002, Hodgson and Hendrickson began negotiating with NIPP for the purchase of the Theater, including the liquor license, the Sunday sales permit and the dance permit. In anticipation of the sale -- and without ever having requested that the liquor license be transferred -- Hodgson submitted a PO to the [City Liquor Control Commission] Committee [("Committee")] on May 28, 2003, stating that he was doing business as "Royal Oak Music Theater" on behalf of "an entity to be formed." The Committee voted to set this PO for a public hearing on June 26, 2003. For reasons not explained by the parties and certainly not clear from the record, the minutes of the Committee state that the public hearing would be set for June 26, 2003, but the minutes of the hearing itself indicate that it was held on June 25, 2003.

On June 24, 2003, Sergeant T.J. Berrington ("Berrington") of the Royal Oak Police Department ("ROPD") sent a memorandum to his superiors regarding a nightclub called "Space" that Hodgson had operated in Detroit. The memorandum contained information -- apparently derived from Berrington's conversations with members of the Detroit Police Department and from two newspaper articles -- indicating that there were 19 assault and battery reports stemming from incidents at Space, mostly concerning bouncers[] assaulting customers. Berrington's memorandum was forwarded to Deputy Chief Wightman ("Wightman") and then to Police Chief Quisenberry ("Quisenberry"). Wightman also included his own memorandum reiterating that there were 19 assault and battery reports resulting from incidents at Space.

Before the June 25th hearing, Hodgson submitted a new PO; it is this PO that was discussed at the hearing on June 25. At that hearing, Deputy City Attorney James Marcinkowski ("Marcinkowski") advised the Committee that POs are not subject to public hearing, so the Committee voted to continue the hearing until July 15. On July 4, Hodgson wrote an email to Quisenberry in order to set the record straight regarding the information contained in the June 24 memorandum, stating that 12 of the 19 assaults that allegedly occurred at Space in fact occurred after Space had closed. Hodgson sent another email to Quisenberry on July 10, complaining that Donald Foster ("Foster") of the ROPD refused to meet with him in order to hear his side of the story.

The next day, Foster sent Quisenberry a report entitled "Space Nightclub Background Investigation (2nd Part)," which Plaintiffs assert was made available to the public and the media before the Plaintiffs were allowed to see it. The report was not flattering from Plaintiffs' perspective. It quoted a newspaper article describing Space as having "mind-altering lights," which it connected with possible use of the drug "ecstasy" at the club, but it also summarized interviews with neighbors of Space and news investigators, all of whom reported that Space was well-run and a good neighbor. A section entitled "Word on the Street" included nine unattributed quotes, supposedly provided by people on the "streets of Detroit in area of Space," all of which cast Space in a negative light from a law-enforcement perspective. The final section of the report again stated that there had been 19 criminal reports stemming from incidents at Space, and additionally linked a murder to the club by stating that the suspect and victim had been arguing inside Space and that the shooting occurred in the Space parking lot. Hodgson was eventually vindicated to some extent when an investigator from the Detroit Police Department sent a letter to Hodgson admitting that "[a]t no time has [sic] warrants been issued or bouncers been investigated for any alleged crimes at Space Night Club."

The July 15th public hearing went forward as scheduled, and Hodgson told the Committee that, if NIPP's liquor license was ever transferred, it would be transferred to ROT, which Hendrickson owns. The Committee voted to recommend that the PO be denied because neither Hodgson, Hendrickson, nor

ROT owned a valid liquor license, and none of them had applied for a new license or the transfer of a new license into Royal Oak. In the Committee's view, the City's ordinances did not permit a non-licensed party -- other than an applicant for a new license or for transfer into the City of a new license -- to submit a PO.

On July 24, 2003, ROE and NIPP entered into a management agreement for the Theater which provided that NIPP would operate the Theater until all licenses and permits were transferred to ROE, at which time ROE would take over management. About the same time, Hendrickson submitted a request that NIPP's liquor license be transferred to ROT. On August 1, Marcinkowski drafted two proposed resolutions for the Committee to adopt, stating "BE IT RESOLVED that the request of 'Space' and/or Murray Hodgson to operate the Royal Oak Music Theatre (318 West Fourth Street) is denied" and "BE IT FURTHER RESOLVED that the proposed plan of operation of 'Space' and/or Murray Hodgson is denied." The Committee adopted both resolutions at its August 4th meeting.

Two days later, Marcinkowski sent a letter to Julie Wendt, Director of Licensing for the Michigan Liquor Control Commission ("MLCC"), informing her that the Committee had passed a resolution denying Hodgson's request to operate the Theater. He sent another letter on August 12th, telling her about the management agreement between NIPP and ROE. The MLCC wrote to Hendrickson on August 11th, telling him not to invest any money in renovating the Theater until the transfer of the

liquor license from NIPP to ROT was approved. The ROE-NIPP management agreement was dissolved shortly thereafter because the Committee had voted to not allow Hodgson to operate the Theater, and, on August 28th, ROT and NIPP entered into a management agreement for the Theater. Meanwhile, on August 18th, Hodgson submitted another PO to the Committee for its approval.

Hodgson thereafter requested that the Committee reconsider its August 4th decision to not allow him to operate the Theater. The Committee met the next day and made no decisions regarding Hodgson's newest PO or his request for reconsideration, but suggested that it address at its next meeting the issue of whether NIPP's liquor license should be transferred to ROT. On October 3rd, NIPP (which still owned the liquor license) and ROT jointly submitted a PO to the Committee, and ROT submitted another one on October 8th. The Committee approved the October 3rd PO at its October 14th meeting, but did not address the liquor license transfer. ROT thereafter submitted yet another PO, which the Committee approved on November 6th. At that time, it also voted to recommend to the City Commission that NIPP's liquor license not be renewed unless, before the license came up for renewal, NIPP installed a fire suppression system in the Theater. Moreover, the Committee voted to recommend that NIPP's Class C liquor license be transferred to ROT, but recommended that the dance permit accompanying the liquor license not be transferred. The City Commission adopted these recommendations, but the MLCC, which has the final authority to grant or

deny a liquor license transfer, never acted on these recommendations and has never transferred NIPP's liquor license to any entity.

Plaintiffs filed this action on July 21, 2004, alleging that the Defendants had violated their rights to due process and equal protection, retaliated against them for exercising their First Amendment rights, conspired to deprive them of their constitutional rights, and failed to prevent the violation of their constitutional rights, and that the Defendants are liable to them for damages under the RICO Act. The complaint also contains several state-law causes of action.

On September 14, 2004, the Defendants collectively filed a motion to dismiss for failure to state a claim upon which relief can be granted. The district court took the motion under advisement and, on January 6, 2005, entered an order converting it to a motion for summary judgment and directing the parties to present to the court any evidence and arguments that they wanted considered for purposes of the motion. Several months later, after hearing oral argument on the motion, the court granted summary judgment to the Defendants on all of the Plaintiffs' federal claims and declined to exercise jurisdiction over the remaining state-law claims. *Royal Oak Entm't*, 205 F. App'x at 391-94 (footnotes omitted). Plaintiffs appealed and this Court affirmed the district court's grant of summary judgment on Plaintiffs' federal claims.[1] *Id.* at 398.

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[1] The district court claimed to have "remanded" Plaintiffs' state law claims despite the fact the case

Thereafter, Defendants filed a motion seeking $98,260 in attorney fees and $739 in costs under 42 U.S.C. § 1988 and 28 U.S.C. § 1927. *Royal Oak Entm't, LLC v. City of Royal Oak*, 486 F. Supp. 2d 675, 677 (E.D. Mich. 2007). The district court granted Defendants' motion in part, finding Plaintiffs and their counsel, Cindy Rhodes Victor, jointly and severally liable for $29,772.50 in fees only. *Id.* at 680.

Plaintiffs and their counsel moved for reconsideration, which the district court denied on June 8, 2007. *Royal Oak Entm't, LLC v. City of Royal Oak*, No. 04-72728, 2007 U.S. Dist. LEXIS 43726, at *1 (E.D. Mich. June 8, 2007). This appeal followed.

II. ANALYSIS

A. Standard of Review

"We review a district court's award of attorneys fees under 42 U.S.C. § 1988 based on an abuse of discretion standard." *Wilson-Simmons v. Lake County Sheriff's Dep't*, 207 F.3d 818, 823 (6th Cir. 2000). "In light of a 'district court's superior understanding of the litigation and the desirability

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was originally filed in federal court. This Court considered the district court's remand as a declination of supplemental jurisdiction and dismissed the state claims for lack of subject matter jurisdiction. *Royal Oak Entm't*, 205 F. App'x at 394 n. 2.

of avoiding frequent appellate review of what essentially are factual matters,' an award of attorneys' fees under § 1988 is entitled to substantial deference." *Reed v. Rhodes*, 179 F.3d 453, 469 n.2 (6th Cir. 1999) (*quoting Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). We also apply an abuse-of-discretion standard of review to decisions awarding sanctions under 28 U.S.C.§ 1927. *Runfola & Assocs., Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 375 (6th Cir. 1996) (*citing Orlett v. Cincinnati Microwave, Inc.*, 954 F.2d 414, 417 (6th Cir. 1992)).

B. Sanctions under 42 U.S.C. § 1988

Under 42 U.S.C. § 1988, a district court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). "[A] prevailing defendant should only recover upon a finding by the district court that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Wayne v. Vill. of Sebring*, 36 F.3d 517, 530 (6th Cir. 1994) (internal quotation omitted). "Application of these standards requires inquiry into the plaintiffs' basis for bringing suit." *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 183 (6th Cir. 1985). "[I]n applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978). A

"plaintiff should not be assessed his opponent's attorney fees unless the court finds the claim was groundless at the outset or 'that the plaintiff continued to litigate after it clearly became so.'" *Smythe-Cramer Co.*, 754 F.2d at 183 (emphasis added) (*quoting Christiansburg Garment Co.*, 434 U.S. at 422)).

We conclude that the district court's decision awarding attorney fees was not an abuse of discretion because Plaintiffs' claims were frivolous. In awarding attorney fees, the district court determined that "Plaintiffs and their counsel should have known after the filing of Defendants' motion to dismiss the federal claims that their federal claims had no basis in law . . . ." *Royal Oak Entm't*, 486 F. Supp. 2d at 677. We agree. Plaintiffs should have been aware, particularly after Defendants' filing, that they lacked standing to sue for violations of their asserted substantive and procedural due process rights. This Court has consistently held that a plaintiff who brings a substantive or procedural due process claim must identify a protected liberty or property interest. *Wojcik v. City of Romulus*, 257 F.3d 600, 609 (6th Cir. 2001) (*citing Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). Here, Michigan law clearly states that no entity has a property interest in a liquor license unless the entity holds the license or has held it in the past. *Wojcik*, 257 F.3d at 609-10. Even "[r]udimentary legal research would have shown these Plaintiffs did not have standing because they had no property interest in the liquor license or any of its attendant permits because they never held either the license or the permits." *Royal*

Oak Entm't, 486 F. Supp. 2d at 679 (citations omitted). Thus, Plaintiffs acted frivolously when they continued pursuing this action after Defendants pointed out this inadequacy in their motion to dismiss.

Further, Plaintiffs' remaining claims lacked foundation, and they acted with frivolity when they failed to dismiss those claims after reviewing Defendants' motion to dismiss. Specifically, Plaintiffs brought claims against Defendants for First Amendment retaliation, as well as violations of equal protection under 42 U.S.C. § 1983, violations of 42 U.S.C. §§ 1985 and 1986, and for damages under the 18 U.S.C. §§ 1961 and 1962 ("Racketeer Influenced and Corrupt Organizations Act" or "RICO"). In our previous decision, we determined that the record was devoid of evidence showing a causal connection between protected First Amendment activity and any alleged adverse government action, and that Plaintiffs had failed to provide any facts or other evidence in support of that claim. *Royal Oak Entm't*, 205 F. App'x at 398. We also concluded that Plaintiffs' equal protection claim was wholly unsupported by the record. *Id.* at 398-99. Similarly, we determined that no case law supported Plaintiffs' arguments under §§ 1985 and 1986. *Id.* Finally, we stated that "Plaintiffs have wholly failed to plead -- let alone show evidence of -- any predicate offense committed by Defendants" to support a claim under RICO. *Id.* Considering the record that was before the district court, that court was well within its discretion to award sanctions against Plaintiffs under 42 U.S.C. § 1988.

C. Sanctions under 28 U.S.C. § 1927

28 U.S.C. § 1927 allows a court to award sanctions against any attorney who "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. The statute specifically provides that in such situations, a court may require an attorney "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *Id.* A court may assess fees without finding bad faith, but"[t]here must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *Ridder v. City of Springfield*, 109 F.3d 288, 298 (6th Cir. 1997) (*citing In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987)). In short, "§ 1927 sanctions require a showing of something less than subjective bad faith, but something more than negligence or incompetence. Thus, an attorney is sanctionable when he intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2007) (internal citations omitted). "We construe 'vexatiously multiplying proceedings' to include conduct where 'an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of non-frivolous claims.'" *Shepherd v. Wellman*, 313 F.3d 963, 969 (6th Cir.

2002) (*quoting Jones v. Cont'l Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986)). "We have also held that § 1927 sanctions are appropriate where 'an attorney has engaged in some sort of conduct that, from an objective standpoint, falls short of the obligations owed by the member of the bar to the court and which, as a result, causes additional expense to the opposing party.'" *Shepherd*, 313 F.3d at 969 (*quoting Holmes v. City of Massillon*, 78 F.3d 1041, 1049 (6th Cir. 1996) (internal quotation omitted)).

Here, the court imposed sanctions for counsel's failure to fulfill her "obligation as an officer of [the] Court to instruct her clients that they had no legal remedy and either voluntarily dismiss this case or make a good faith argument to change the law." *Royal Oak Entm't*, 486 F. Supp. 2d at 679. Because Plaintiffs' counsel did neither, we believe the district court properly concluded that she "therefore fell short of her obligations to the bar." *Id.* at 680. These failures forced Defendants to incur significant additional expenses after Defendants' motion to dismiss pointed out why Plaintiffs had no claim. Thus, we affirm the sanctions against Plaintiffs' counsel under § 1927.

D. Sanctions under Federal Rule of Civil Procedure 11

Finally, Plaintiffs' argument that the district court abused its discretion in awarding fees and costs under Rule 11 is foreclosed by the district court's reconsideration order of June 8, 2007, which explicitly states that "Federal Rule of Civil Procedure 11 is not the basis of these sanctions."

Royal Oak Entm't, 2007 U.S. Dist. LEXIS 43726, at *2.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the decision of the district court awarding fees of $ 29,772.50 to Defendants under 42 U.S.C. § 1988 and 28 U.S.C. § 1927.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

ROYAL OAK ENTERTAINMENT, L.L.C., a Michigan limited liability company, MURRAY HODGSON, ROYAL OAK, THEATRE, L.L.C., a Michigan limited liability company, and PETER HENDRICKSON, Plaintiffs,

v.

CITY OF ROYAL OAK, MICHIGAN, JAMES MARCINKOWSKI, CHARLES SEMCHENA, DONALD FOSTER, T.J. BERRINGTON, TERRY DRINKWINE, MICHAEL ANDRZEJAK, CARLO GINOTTI, ILENE LANFEAR and JEANNE SARNACKI, individually and in their official capacities, jointly and severally, Defendants.

Civil No. 04-72728

OPINION AND ORDER GRANTING IN PART DEFENDANTS' MOTION FOR COSTS AND ATTORNEYS' FEES

Defendants[1] have filed a motion to recover

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[1] The Defendants in this case, with their titles as alleged in the Complaint, are as follows:

. City of Royal Oak, Michigan
. James Marcinkowski, Deputy City Attorney of Royal Oak

attorneys' fees and costs from Plaintiffs Royal Oak Entertainment, LLC, Murray Hodgson, Royal Oak Theatre, LLC, and Peter Hendrickson, as well as their attorney Ms. Cindy Rhodes Victor. I previously granted summary judgment on all federal claims to the Defendants, see 2005 U.S. Dist. LEXIS 6401, 2005 WL 2038586 (E.D. Mich. Apr. 14, 2005), and was affirmed by the Sixth Circuit. 205 Fed. Appx. 389 (6th Cir. 2006). I hereby GRANT IN PART Defendants' motion, and find Plaintiffs and their counsel Ms. Victor are jointly and severally liable to Defendants for $ 29,772.50 in attorney fees pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1927.

. Charles Semchena, City Attorney of Royal Oak

. Donald Foster, Former Lieutenant in Royal Oak Police Department

. T.J. Berrington, Member, Royal Oak Police Department

. Terry Drinkwine, Member, City Commission (Comm'n) of Royal Oak

. Michael Andrzejak, Member, City Comm'n of Royal Oak

. Carlo Ginotti, Member, City Comm'n & Liquor Control Commission (LCC) of Royal Oak

. Ilene Lanfear, Member, City Comm'n & LCC of Royal Oak, and

. Jeanne Sarnacki, Member, City Comm'n & LCC of Royal Oak.

. A resident of Royal Oak named Rodney Keteyian was originally a defendant in this case, but the claim against him was dismissed separately from the remaining claims. He is not a party to this motion.

I. FACTUAL BACKGROUND

In this case,[2] Plaintiffs sued Defendants claiming that Defendants' failure to issue a plan of operation that would permit them to have dancing at the Royal Oak Music Theater, as well as the failure to transfer to Plaintiffs the liquor license and dance permit belonging to Nobody in Particular Presents (NIPP), violated Plaintiffs' rights under the United States Constitution and other federal and state laws. (Compl.) Plaintiffs never possessed either the liquor license or the dance permit, because the City never approved such a transfer, and under Michigan law transfers of such licenses and permits must be approved by the City. See, e.g., *Wojcik v. City of Romulus*, 257 F.3d 600, 609-11 (6th Cir. 2001). I granted summary judgment on all federal claims[3] to the Defendants by finding that Plaintiffs did not have standing to bring their due process claim because they had no property interest in the license,

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[2] Previously I heard another case regarding this factual situation. In that case, Defendants filed a motion for attorney fees, but withdrew it as part of a stipulation by which the plaintiff in that case agreed to forego its right to appeal the judgment of this Court. (Case No. 05-71320, Dkt. No. 56, Mar. 30, 2007.) This opinion does not address any occurrence in that case.

[3] After I granted summary judgment, the three state law claims: (1) libel and slander, (2) unfair competition, and (3) unjust enrichment, were dismissed without prejudice.

and by finding that Plaintiffs had failed to "show any plausible evidence" of a First Amendment retaliation claim. (Op. & Order Granting Summ. J. 7-17.) The Sixth Circuit affirmed this judgment, and additionally found that each of Plaintiffs' further federal claims: violations of (1) the Equal Protection clause, (2) 42 U.S.C. § 1985(3), (3) 42 U.S.C. § 1986, and (4) RICO, were without merit and should be dismissed.

This motion seeks recovery for attorney fees for seven motions and the Answer, asserting attorney fees of $98,260.00 and costs of $739.00 for a total of $98,999.30. (Mot. for Atty. Fees 9.) These claims are made against the Plaintiffs pursuant to 42 U.S.C. § 1988 and the Plaintiffs' counsel pursuant to 28 U.S.C. § 1927.

II. LEGAL STANDARDS

Pursuant to 42 U.S.C. § 1988, attorney fees may be awarded "to a prevailing defendant upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Wilson-Simmons v. Lake County Sheriff's Dep't*, 207 F.3d 818, 823 (6th Cir. 2000) (internal citations omitted). An action is frivolous if "it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989). Further, pursuant to 28 U.S.C. § 1927, a prevailing defendant's attorney fees may be taxed to the opposing attorney "when an attorney has engaged in some sort of conduct that, from an objective standpoint, falls short of the obligations

owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *Wilson-Simmons*, 207 F.3d at 824 (internal citations omitted).

III. ANALYSIS

After applying the above standards, it is clear that Plaintiffs and their counsel should have known after the filing of Defendants' motion to dismiss the federal claims that their federal claims had no basis in the law, and therefore they should be held liable for the portion of Defendants' attorney fees related to the motion to dismiss the federal claims, the motion for summary judgment, and conferences I held with the parties after these motions were filed. I further find Defendants are not entitled to reimbursement for any other attorney fees. Lastly, because I find that Defendants incurred these unnecessary fees in major part due to inadequate legal research on the part of Plaintiffs' counsel, I find that both Plaintiffs and their counsel are jointly and severally liable to Defendants pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1927.

1. Grant Attorney Fees for Motion to Dismiss Federal Claims and Motion for Summary Judgment

I find it appropriate to grant attorney fees for the motions to dismiss the federal claims and for summary judgment. While at the time of the Answer Plaintiffs could reasonably argue they believed some legal remedy was appropriate, it was clear by the time these motions were filed that no legal remedy was. Michigan law clearly states that

no entity has a property interest in a liquor license or attendant permit unless it is the entity who holds the license or who had held it in the past. *Wojcik*, 257 F.3d at 609-10. Attorney fees would not be appropriate if Plaintiffs had made some good faith argument to modify that law, but they failed to do so. See, e.g., Fed. R. Civ. P. 11(b)(2). They instead argued they should recover regardless, and in fact failed to address this precedent or the material precedent on third party standing in their response briefs to Defendants' motions. (See Pls. Resp. Br. to Mot. to Dismiss Federal Claims; Pls. Resp. Br. to Mot. for Summ. J.) Their arguments and evidence for the other federal claims were equally as weak, if not ridiculous. (See, e.g., Op. & Order Granting Summ. J. 16-17 (finding "no plausible evidence" of First Amendment retaliation claim).) Plaintiffs should have been aware of the law governing their federal claims and, at the very least, withdrawn the claims themselves once Defendants highlighted the claims' lack of legal foundation in their motion to dismiss the federal claims and again in their motion for summary judgment. Plaintiffs' claim at oral argument that no award is proper because Plaintiffs and their counsel believed at the beginning of the case that the claims had merit is immaterial because subjective bad faith is not required to award attorneys fees in this situation. *See Christianburg Garment Co.*, 434 U.S. at 421 ("In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."); see also *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S. Ct.

173, 66 L. Ed. 2d 163 (1980) (extending *Christianburg* rationale to recovery of fees in § 1983 claims). Because it should have been obvious to Plaintiffs upon the filing of Defendants' motion to dismiss that they had no legal basis upon which to make these federal claims, and Plaintiffs irregardless of that fact continued to oppose Defendants through the briefing for both the motion to dismiss and the motion for summary judgment, Defendants should recover their reasonable attorney fees for each of these motions.[4]

2. Deny Attorney Fees for All Other Aspects of this Case

I DENY Defendants' motion as it pertains to the remainder of their attorney fees and costs. Several of these motions I never ruled upon and were not

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[4] The filing of the motion to dismiss the federal claims before the motion for summary judgment should not preclude recovery of attorneys' fees for the motion for summary judgment because the motion to dismiss was not denied on its merits, but converted to a motion for summary judgment pursuant to Fed. R. Civ. P. 12(b)(6). This conversion was made because matters outside the pleading were presented in the briefing on Defendants' motion to dismiss the federal claims. (See Order of Jan. 6, 2005; Fed. R. Civ. P. 12(b)(6).) Fed. R. Civ. P. 12(b)(6) provides that parties "be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56," thus permitting briefing on the motion for summary judgment itself was required by the rule. Therefore, it is appropriate to find Plaintiffs liable for fees incurred in both of these motions.

required by this case.[5] (See Defts Mot. for Protective Order, Defts Mot. to Limit Extrajudicial Statements, Defts Mot. for Leave to File a Counter Complaint, & Defts Mot. to Strike.) Further, it would be inappropriate to grant attorney fees for Defendants' motion to dismiss the state law claims when those claims were dismissed without prejudice so they could be decided by the Oakland County Circuit Court.[6]

The only other filing for which Defendants seek attorney fees is the Answer. This is a close issue, but I do not permit Defendants to recover their attorney fees incurred in answering the Complaint or otherwise developing a case strategy. While I find the law regarding Plaintiffs' standing to bring

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[5] Defendants at oral argument and in their reply brief claimed these motions were necessary due to actions of Plaintiffs and their counsel. (Defts Reply Br. 5.) While I appreciate Defendants' position that in the heat of litigation these motions were deemed necessary to protect their interests should this case have gone to trial, I cannot find they were necessary to the case, however, as they were never heard and I do not find them to be central to the case or its disposition.

[6] In the opinion, I stated I was remanding the state claims to the Oakland County Circuit Court. (Op. & Order Granting Summ. J. 17.) The Sixth Circuit altered this statement slightly, properly interpreting it as a dismissal of the state claims without prejudice requiring refiling in state court should Plaintiffs wish to bring them. See 205 Fed. Appx. at 394 n.2. The effect is the same for the attorney fees inquiry.

such a claim was clear enough for attorneys' fees to be granted for the motions to dismiss and for summary judgment, and I find that Plaintiffs' counsel's failure to conduct adequate legal research on this issue is sanctionable, I am unwilling to find that Defendants are entitled to attorneys' fees from the outset of this case. I use my discretion to find that while bringing this case was an error, it was not so grave an error to qualify as "frivolous, unreasonable, or without foundation" from the outset of this litigation. *See Wilson-Simmons*, 207 F.3d at 823. This error only crossed into that realm once Plaintiffs and their counsel were apprised of the legal error in their claim and continued litigating it without making a good faith argument for a modification of the law. Therefore, I DENY attorney fees for the Answer and other strategic planning of the defense.

3. Find Liability for Attorney Fees pursuant to both 42 U.S.C. § 1988 and 28 U.S.C. § 1927

I find that the Plaintiffs should be held liable for these fees pursuant to 42 U.S.C. § 1988, and that their counsel also should be held personally liable pursuant to 28 U.S.C. § 1927. The grounds on which I find an award of fees appropriate is that after the Defendants had clearly outlined the reasons these Plaintiffs did not have standing to make these claims according to clearly established Michigan law, Plaintiffs continued to litigate this case. Rudimentary legal research would have shown these Plaintiffs did not have standing because they had no property interest in the liquor license or any of its attendant permits because they

never held either the license or the permits. *See, e.g., Wojcik*, 257 F.3d at 609-11; *Barr v. Pontiac City Comm'n*, 90 Mich. App. 446, 282 N.W.2d 348, 350 (Mich. App. 1979) *citing Bisco's, Inc. v. Liquor Control Comm'n*, 395 Mich. 706, 238 N.W.2d 166 (Mich. 1976) and *Bundo v. City of Walled Lake*, 395 Mich. 679, 238 N.W.2d 154 (Mich. 1976). Thus, both Plaintiffs and their counsel are at fault here, so I find they should be jointly and severally liable for Defendants' attorneys' fees. This Court is well aware of the public policy implications of finding plaintiff's attorneys personally liable for frivolous cases and the strong need for zealous advocates amongst those who believe they have been wronged, but it is also aware that each attorney has a duty as an officer of this Court not to unduly prolong cases that wholly lack legal merit. Once it had been made clear by the Defendants' motions that this case lacked legal merit due to Plaintiffs' lack of standing, it was Ms. Victor's obligation as an officer of this Court to instruct her clients that they had no legal remedy and either voluntarily dismiss this case or make a good faith argument to change the law.[7] n7

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[7] *See Wilson-Simmons*, 207 F.3d at 824 ("An attorney's ethical obligation of zealous advocacy on behalf of his or her client does not amount to carte blanche to burden the federal courts by pursuing claims that are frivolous on the merits.... Accordingly ... when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney.")

[*680] She did neither, and she therefore fell short of her obligations as a member of the bar. For this reason, this Court finds she is jointly and severally liable with the Plaintiffs for Defendants' attorneys' fees incurred regarding their motion to dismiss the federal claims as well as their motion for summary judgment.[8]

From the billing records presented with the motion for attorneys' fees, it appears Defendants are entitled to $ 29,772.50 in attorneys fees. I have calculated this number by adding the total hours spent addressing Defendants' motion to dismiss the federal claims, Defendants' motion for summary judgment, and the time spent preparing for and attending both a status conference and a settlement conference held by this Court after the motion to dismiss the federal claims was filed. (See Def'ts Mot. for Atty. Fees Ex. 1.) Donna Heiser, an associate with ten years experience, billed 111.6 hours to these issues at a rate of $200 per hour, and T. Joseph Seward, a partner with more than 20 years of experience, billed 27.1 hours to these issues at a rate of $ 275 per hour. (Id. Exs. A & 1.) This total is $29,772.50. As Defendants have not indicated which

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quoting In re Ruben, 825 F.2d 977, 984 (6th Cir. 1987).

[8] The Sixth Circuit has previously affirmed an award of attorneys fees that found Plaintiff and her counsel jointly and severally liable despite the fact their liability derives from different statutes. *See Wilson-Simmons*, 207 F.3d at 821.

of their costs were directly related to these motions as opposed to other aspects of this case, I award them none of their costs. (See id. Ex. 2.)

IV. CONCLUSION

For the aforementioned reasons, I GRANT IN PART Defendants' motion for attorney fees and find that Plaintiffs and their counsel Ms. Victor are jointly and severally liable to the Defendants for $ 29,772.50 of attorneys' fees pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1927.

IT IS SO ORDERED.

Date: May 21, 2007

s/ John Feikens

United States District Judge

No. 07-1904

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROYAL OAK ENTERTAINMENT, L.L.C., ET AL., Plaintiffs-Appellants,

v.

CITY OF ROYAL OAK, ET AL., Defendants-Appellees.

BEFORE: KENNEDY, NORRIS, and COLE, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green

Clerk

Filed: May 29, 2009